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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term 1941.

No. 1152

HARRY LEAFORD MILLER and SAMUEL EUGENE CROSBY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

DAN R. SCHWARTZ,
Attorney for Petitioners.

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No.

HARRY LEAFORD MILLER and SAMUEL EUGENE CROSBY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Now come Harry Leaford Miller and Samuel Eugene Crosby and respectfully show and represent to this Honorable Court as follows:

1. Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause, No. 9972, entered on February 20th, 1942. Petition for rehearing was denied on March 24th, 1942, affirming the

orders and judgment of the United States District Court for the Southern District of Florida, Jacksonville Division.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240-(a), of the Judicial Code as Amended, and the Rules of Practice and Procedure in Criminal Cases, as promulgated by this Honorable Court.

REASONS RELIED UPON FOR SEEKING THE JURISDICTION AND FOR THE ALLOWANCE OF THE WRIT.

Because the United States Circuit Court of Appeals for the Fifth Circuit, in affirming the orders and judgment of the District Court:

1. Has decided important questions of general law in conflict with the weight of authority.

(a) Said decision on questions of law conflicts with the opinions of this Honorable Court.

(b) Said decision on questions of law conflicts with the decisions of at least two different United States Circuit Courts of Appeal, namely the Second and the Eighth Circuits.

2. The decision has so far departed from the accepted and usual judicial procedure and has so far sanctioned such a departure by the lower court as to call for an

exercise of the power of supervision of this Honorable Court.

(a) Said decision rendered null and void, the accuseds' rights to cross examination of a witness for the prosecution.

(b) Said decision rendered null and void, the accuseds' rights to be confronted with a witness against them, as guaranteed by the Sixth Amendment to the Constitution of the United States.

(c) Said decision, although admitting error in the lower court, erroneously found said error to be "harmless", in a case based upon circumstantial evidence alone, and where there was a conflict in the testimony.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioners were convicted of violation of the Internal Revenue Laws of the United States, relating to non-tax paid distilled spirits, both the substative offense and a conspiracy being consolidated for trial.

The testimony as to petitioners was entirely circumstantial, and error was admitted by the Circuit Court of Appeals for the Fifth Circuit (page 6 of the printed opinion), when counsel was refused the right to examine a paper used by a Government witness, Louis N. West, who admitted from the witness stand that he was refresh-

ing his memory as to certain automobile truck license numbers and the street number of a garage.

A Co-defendant, Lee Cantrell, was taken ill after the jury was empanelled and before any testimony was offered, and a mistrial and severance was entered as to him (R. 14-15). Subsequently, statements attributed to Cantrell, were admitted in evidence over proper objections (R. 53).

Since the evidence was entirely of a circumstantial nature and did not exclude a reasonable hypothesis of innocence, the motion for a directed verdict of not guilty should have been granted.

ASSIGNMENT OF ERRORS.

1. Refusal of the trial court to allow petitioners to see memorandum testified from, from the witness stand.

2. Admission of testimony of an alleged conspirator, not on trial.

3. Inadequacy of circumstantial evidence to warrant conviction, especially considering the fact that error in the admission of testimony was admitted by the Circuit Court of Appeals.

Wherefore, for the foregoing reasons, as amplified in the following supporting brief, petitioners respectfully submit that their petition for Writ of Certiorari should be granted.

DAN R. SCHWARTZ,
Attorney for Petitioners.

ARGUMENT IN SUPPORT OF PETITION.

I.

The refusal of the lower court to permit petitioners' counsel the right to examine the notes testified from by the witness Louis N. West (see supplemental record filed and admitted by Circuit Court of Appeals at time of argument, but inadvertently omitted from original record), was reversible error and in conflict with the principle laid down by this Honorable Court in *United States vs. Socony Vacuum Oil Company,* 80 Supreme Court 811, 849; 310 U. S. 150; 84 Law Edition 1129, where this Honorable Court held:

> "Normally, of course, the material so used must be shown to opposing counsel upon demand, if it is handed to a witness. (Morris vs. U. S., 5th Circuit, 149 Fed. 123, 126, 9 Ann. Cas. 558. Lennon vs. U. S. 8th Circuit, 20 Fed. (2d) 490, 493, 494. Wigmore, Evidence, (Second Edition), Paragraph 762."

In the foregoing opinion of this Honorable Court, the case of *Little vs. United States,* Eighth Circuit, 93 Fed. 2d 401, was cited with approval, which held,

> "counsel for the Government argued that it is impossible to say from the record whether the witness refreshed his memory upon a disputed fact or purely on an undisputed fact, and that therefore the record fails to show that the appellant was prejudiced. This argument is a mis-application of Section 269 of the Judicial Code as Amended, 28 U. S. C. 391, (28 U. S. C. A. 391), which provided that in an appellate pro-

> ceeding, judgment shall be given without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

This Honorable Court also cited with approval, in the case of *United States vs. Socony Vacuum Oil Company, supra,* the case of *Morris vs. United States, supra,* in which the Circuit Court of Appeals for the Fifth Circuit held:

> "We understand it to be a universal rule of evidence in the courts of this country that, where a witness is permitted to examine and refresh his memory with a paper, it is to be tendered to the other side for inspection just as soon as it has been identified. This rule is found in all the text books, and if numerous adjudged cases declaring it are not found on all hands it is because of the absence of nisi prius reports and because so few courts have ever denied the right in question * * * It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which were permitted here * * *. The rule should be more rigidly adhered to in criminal than in civil cases."

The decision of the Fifth Circuit Court of Appeals was also in conflict with the Eighth Circuit Court of Appeals in *Lennon vs. United States,* 20 Fed. 2d 490, which this Honorable Court cited with approval in the case of *United States vs. Socony Vacuum Oil Company, supra,* the opinion holding that:

> "It is a well settled rule that the opposing party, or counsel, has the right, on proper demand, to inspect and use for the purposes of cross examination, any paper or memorandum which is used by a witness

> while on the stand for the purpose of refreshing his present recollection. This right is accorded in order that he may ascertain whether the paper or memorandum has any legitimate tendency to bring the facts in controversy to the mind of the witness and in order that he may be in a position to cross examine as to the testimony given, thereby to test the candor and integrity of the witness."

The Eighth Circuit Court of Appeals, in *Little vs. United States,* 93 Fed. 2d 401, cited and approved by this Honorable Court, held:

> "An accused or his counsel has the right, on proper request or demand, to inspect and use for cross examination, any paper or memorandum used by a witness on direct examination in refreshing his present recollection."

The decision of the Fifth Circuit Court of Appeals is also in conflict with the Second Circuit Court of Appeals which held, in *Goldman, et als. vs. United States,* 118 Fed. 2d 310, 314:

> "Memoranda actually used by a witness when testifying, may be examined by opposing counsel on request";

citing with approval, *United States vs. Socony Vacuum Oil Company, supra; Morris vs. United States, supra,* and *Lennon vs. United States, supra.*

The opinion of the Fifth Circuit Court of Appeals in the instant case, at page six, held:

"Although the evidence as to Miller and Crosby was wholly circumstantial—."

Thus, we contend, any evidence as to automobile truck license numbers was prejudicial as the evidence as to trucks permeated the entire case, particularly as to the petitioner Miller.

The Eighth Circuit Court of Appeals held in *Little vs. United States,* 93 Fed (2d) 401:

"The burden of showing prejudice is upon the appellant and he is not entitled to reversal of a judgment or a conviction unless it appears that he has been denied some substantial right and has been, thereby, prevented from having a fair trial—."

"Here appellant was denied his undoubted right properly to cross examine the witness. The evidence as to his own guilt was conflicting. He testified in his own behalf to facts which, if credited and believed by the jury, would establish his innocence. Under these circumstances, it would seem that the appellant had acquitted himself of the burden of pointing out in the record the denial of a substantial right."

On the question that the rejection of evidence was erroneous and that it was prejudicial, this Honorable Court held in *McCandless et ux vs. United States,* 298 U. S. 342, 347, 56 Supreme Court, 764, 766:

"Second. The court below, while ruling that the rejection of the evidence was erroneous, held that it was not prejudicial error within the terms of section

269 of the Judicial Code, as amended (28 U. S. C. §391, 28 U. S. C. A. §391), reproduced in the margin.* The court thought the offers of proof were not sufficiently specific to enable it to say that the rejection, although erroneous, was prejudicial. Apparently what was meant by the offers not being sufficiently specific, as indicated by a statement earlier in the opinion, is that they did not show what would be the value of the land when reclaimed, nor the cost of developing and delivering a sufficient water supply. But that seems to be the exact basis of the government's contention that the offer was not complete, which, affirming the court below, we have just held is without merit. We think equally it constitutes no ground for sustaining the ruling of the trial court as nonprejudicial. The action of the trial court in rejecting the offers plainly meant that it would be useless to offer further evidence supplementing and dependent upon that which had been rejected. Faced with that ruling and implication, counsel was not required to offer further evidence along that line. Cf. Rogers v. Brent, 5 Gilman (10 Ill.) 573, 588, 589, 50 Am. Dec. 422.

"In this situation, section 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. United States v. River Rouge Co., 269 U. S. 411, 421, 46 S. Ct. 144, 70 L. Ed. 339; Fillippon vs. Albion Vein Slate Co., 250 U. S. 76, 82, 39 S. Ct. 435, 63 L. Ed. 853; Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 48 S. Ct. 417, 72 L. Ed. 761."

*"'On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.'"

II.

The statement of Cantrell (R. 53) was hearsay and inadmissible, because statements of a co-conspirator, to be admissible against his fellow conspirators, must not only have been made during the continuance of the conspiracy, it must likewise have been made in furtherance of its object. *Logan vs. U. S.*, 144 U. S. 263. *Collenger vs. U. S.*, 50 Fed. (2d) 345 (CCA 7). *Tofanelli et als. vs. U. S.*, 28 Fed. (2d) 581 (CCA 9).

In *Kelly vs. United States*, 105 Fed. (2d) 912 (CCA 2), the court held:

> "Declarations of accused fellow conspirators are competent evidence only when made in pursuance of a common object and are admitted as part of the execution of the plan and impliedly authorized by the other conspirators."

The decision of the Fifth Circuit Court of Appeals at page six in the instant opinion held:

> "There was no error in admitting Cantrell's statement. He was one of the principal actors in the illegal undertaking and his statement to the officers was *relevant* as to what was going on."

We seriously challenge the proposition of law that "relevancy" is the test of the admissibility of evidence; even as hearsay evidence is generally relevant although obviously inadmissible.

In *Clark vs. United States*, 61 Fed. 2d 409, the Fifth Circuit Court of Appeals held:

"It appears Stewart and Thomas were the principal conspirators * * *.

"As to statements that were made by Thomas in August, it is possible the conspiracy had been abandoned, at any rate they were merely narratives of past events. And clearly, they were not made by Thomas in furtherance of the conspiracy, and were not part of the res gestae of any overt act. *Considering the conflicting evidence before the jury, we cannot say that the testimony, improperly admitted, was harmless. These errors require a reversal of the judgment.*"

This latter principle of law also applies to the question of counsel being refused permission to examine the memorandum, for there certainly was conflicting evidence in this case.

III.

On the question of the circumstantial evidence, we will not summarize the evidence in the interest of brevity. However, the Fifth Circuit Court of Appeals, in its opinion at page six, agrees that the evidence as to petitioners, Miller and Crosby, was wholly circumstantial.

We seriously contend that this evidence does not measure up to the standard required by that same Court in *DeLuca vs. United States*, 298 Fed. 412 (CCA 5), where the rule was stated to be:

"The rule of law where the Government relies upon circumstantial evidence alone, is that the circumstances proven must not only point to the defendant's

> guilt, but must be inconsistent with his innocence. As otherwise stated, the circumstances proven must be such as to admit of no other reasonable hypothesis or explanation other than the guilt of the accused."

The foregoing case was cited by the same Court in *Kassin vs. United States,* 87 Fed. (2d) 183 (CCA 5):

> "Links in chain of guilt forged by purely circumstantial evidence must be clearly proven and taken together, point to moral certainty, not merely possibility or probability of guilt, to justify conviction of either substantive offenses or conspiracy to commit them."
>
> "Relevant and cogent circumstances may constitute evidence of accused's guilt, but they must have legal as well as logical relevancy and point to guilt with compelling force; circumstances merely raising suspicion or leaving room for conjecture being insufficient."

In the opinion of the Fifth Circuit Court of Appeals in this case at page five, the Court stated:

> "It was further shown that Miller and Deese had, from time to time, purchased large quantities of sugar and rye under assumed names."

With all due deference to the Honorable Court, we are unable to find a single scintilla of testimony that Miller ever bought any sugar or rye at any time, and we seriously contend that the Court erred in making any such finding without any basis in the record.

CONCLUSION.

Therefore, the premises considered, it is respectfully urged that this is a case where jurisdiction should be taken by this Honorable Court and the judgment of conviction reversed and a fair trial awarded to the petitioners as guaranteed by the Constitution of the United States and the Rules of Practice and Procedure.

DAN R. SCHWARTZ,
Attorney for Petitioners.

April, 1942.

APR 23 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941.

No. 1168

JAKE DEES AND FRANK DEES,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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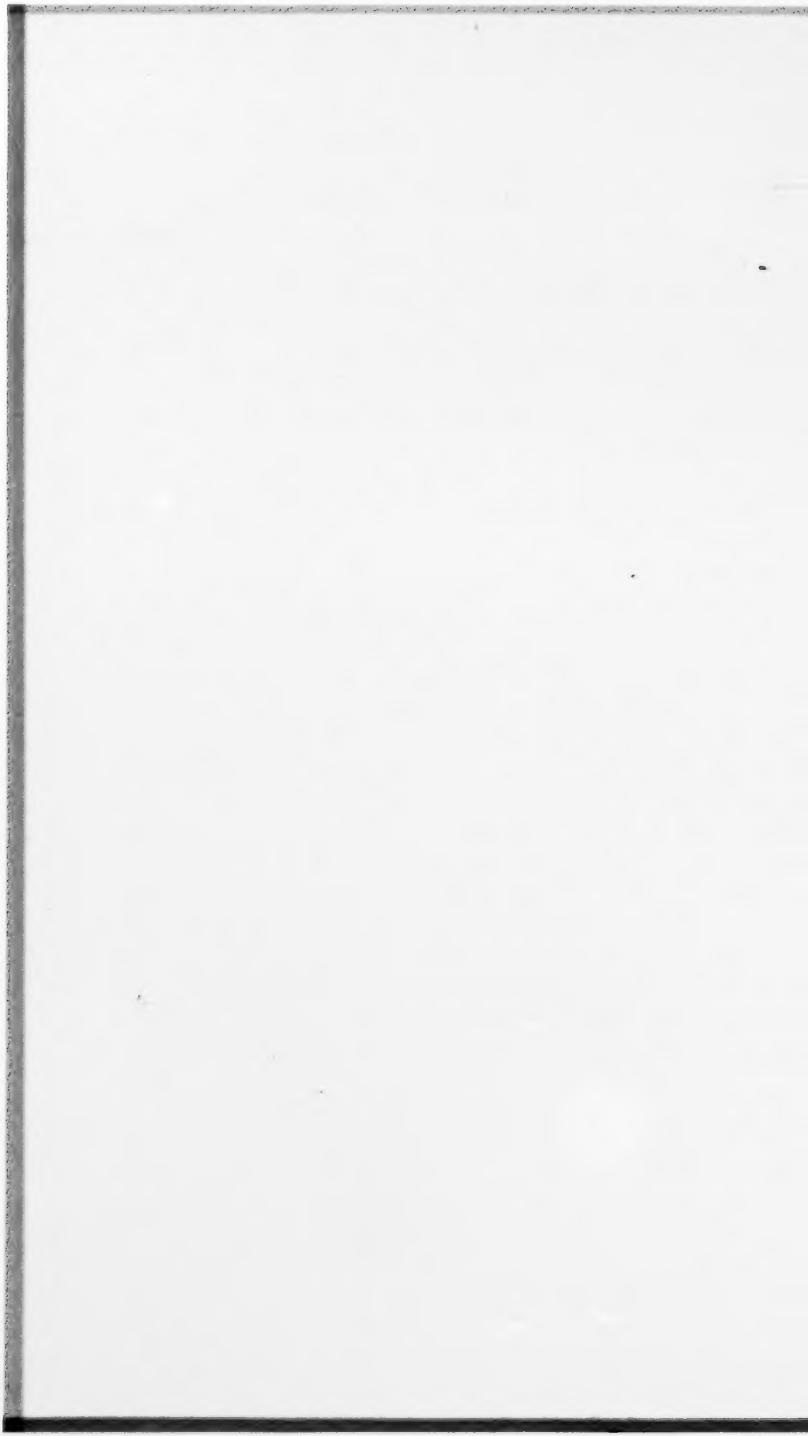

IN THE
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JAKE DEES AND FRANK DEES,
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versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Come now Jake Dees and Frank Dees and respectfully show and represent to this Honorable Court as follows:

1. Petitioners pray that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause, No. 9972, entered on February 20, 1942. Petition for rehearing was denied on March 24, 1942, affirming the orders and judgment of the United States District Court in and for the Southern District of Florida, Jacksonville Division.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under section 240-(a), of the Judicial Code as amended and the Rules of Practice and Procedure in Criminal Cases, as promulgated by this Honorable Court.

REASONS RELIED UPON FOR SEEKING THE JURISDICTION AND FOR THE ALLOWANCE OF THE WRIT.

Because the United States Circuit Court, in affirming the orders and judgment of the District Court:

1. Has decided important questions of general law in conflict with the weight of authority.

a. Said decision on question of general law conflicts with opinions of this Honorable Court in *Taylor vs. U. S.*, 76 Law Ed. 951.

b. Said decision on question of law conflicts with decision of other Circuit Courts of Appeal, namely, *Raniele vs. U. S.*, 34 F. (2d) 877; *DePorter vs. U. S.*, 34 F. (2d) 275; *U. S. vs. Hirsch*, 57 F. (2d) 555; *Bell vs. U. S.*, 9 F. (2d) 820; *U. S. vs. Di Carvo*, 37 F. (2d) 124; and others.

2. The decision has so far departed from the accepted and usual judicial procedure and has so far sanctioned such a departure by the lower court as to call for an exercise of the power and supervision of this Honorable Court.

a. Said decision sanctions the search and seizure of a dwelling and curtilage in the country without the use of a search warrant.

b. The Circuit Court of Appeals apparently sanctioned the violation of the petitioners' constitutional right to be free from unreasonable searches and seizures, for its opinion is based upon a statement of facts not supported by the record. (See record, page 56.)

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioners were convicted of violation of the Internal Revenue Laws of the United States, relating to non-tax paid distilled spirits, both the substantive offense and a conspiracy being consolidated for trial.

The petitioner, Jake Dees and his wife and child were living on a farm in the Southern District of Florida; the petitioner, Frank Dees is the brother of Jake Dees and was visiting him at the time of the search.

Officers of the Alcohol Tax unit saw a truck on a public highway, driven by Frank Dees which was loaded with charcoal and sugar; the officers followed the truck twenty-five and a half miles, at which point they lost sight of the truck for thirty minutes. The officers returned and examined a road leading into a large pasture and saw where a dual-wheeled truck had turned off the highway. The officers followed the truck tracks through the pas-

ture gate and followed the tracks one half mile to the petitioners' farm. The officers stopped in front of a gate leading to the house where they saw Mrs. Dees and child. Officers at this point smelled mash. Officer Anderson did not go to the house but went down the fence and entered the gate of the mule lot, 75 or 100 yards from the house. He saw no men in the barn but saw truck had entered the mule lot gate. The barn was enclosed by chicken wire fence and chickens and ducks were around the barn. Officer Anderson went around the chicken wire fence, stepped over a field fence and proceeded to the back of the barn, at which point he saw a still and heard men talking. Anderson then entered and arrested Jake Dees and Frank Dees, seizing sugar, charcoal, a truck and destroyed the still.

The question is whether officers had the right to enter the curtilage and make exploratory search having only odor of mash for evidence. The Court in its opinion on page 5 stated "the officer did not go into the enclosure until he had smelled the mash, heard men talking and had actually seen the still in operation". This statement is obviously incorrect. (Transcript, page 56.) This did not decide the question presented.

SPECIFICATION OF ERROR.

1. Failure of trial Court to grant motion to suppress evidence.

2. Failure of trial Court to exclude evidence obtained by unlawful and illegal search and seizure.

ARGUMENT.

In *Taylor vs. U. S.*, 76 Law Edition 951, the Court said:

> "The action of prohibition agents who have received information over a considerable period concerning illegal selling at certain premises went there in the night time and smelled whiskey in the vicinity of the garage thereon, and seeing many card board boxes therein, broke the fastening on the door, entered and seized a quantity of whiskey without having obtained a search warrant though they had opportunity to do so constitutes an unreasonable search and seizure."

The Supreme Court indicates in the *Taylor* case that the mere smell of intoxicating liquor is not sufficient to warrant an officer in making a search without first obtaining a warrant and it has frequently been held since the *Taylor* case was written and before the mere smell of intoxicating whiskey or mash standing alone is not sufficient to obtain a search warrant unless there are other facts to strengthen and substantiate the evidence thus obtained.

Such evidence was held insufficient in *Raniele vs. U. S.* (C. C. A.) 34 F. (2d) 877, and *DePorter vs. U. S.* (C. C. A.) 34 F. (2d) 275, 74 A. L. R. 1413, in which private houses were searched. Other cases holding that the sense of smell is not sufficient evidence to warrant a search without a warrant are: *U. S. vs. Hirsch* (C. C.) 57 F. (2d) 555, 556; *Temperani vs. U. S., supra; Bell vs. U. S.* (C. C. A.) 9 F. (2d) 820; *U. S. vs. DiCarvo* (C. C.) 37 F. (2d) 124; *Schroeder vs. U. S.* (C. C. A.) 14 F. (2d) 500; *Staker vs. U. S.* (C. C. A.) 5 F. (2d) 312; *Day vs. U. S.* (C. C. A.)

37 F. (2d) 80, and *U. S. vs. Dean* (D. C.) 50 F. (2d) 905, 906.

CONCLUSION.

Therefore, the premises considered, it is respectfully urged that this is a case where jurisdiction should be taken by this Honorable Court and the judgment of conviction reversed and a fair trial awarded to the petitioners as guaranteed by the Constitution of the United States and the Rules of Practice and Procedure.

Respectfully submitted,

FRANK F. L'ENGLE,
Attorney for Petitioners.

DILLON HARTRIDGE,
Of Counsel for Petitioners.